90-1556

Supreme Court, U.S.
FILED
APR 9 1991
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF MISSOURI,
Petitioner,

VS.

RANDY ALLEN
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

WILLIAM L. WEBSTER
Attorney General
PHILIP M. KOPPE
Assistant Attorney General
(Counsel of Record)
3100 Broadway, Suite 609
Kansas City, Missouri 64111
(816) 531-4207

Attorneys for Petitioner

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTIONS PRESENTED

1. Whether nonthreatening, advisory warnings by a prosecutor, informing a defense witness of his Sixth Amendment right to counsel and his Fifth Amendment right against self-incrimination violate a defendant's Sixth Amendment right to call witnesses in his own behalf simply because the witness, after consulting with court-appointed counsel, elects to exercise his Fifth Amendment right against self-incrimination, and declines to testify further, and the trial judge, in response to this decision, orders the witness' direct testimony stricken?

2. Whether, assuming a trial court errs in striking the direct testimony of a defense witness after he has invoked his Fifth Amendment privilege against self-incrimination and has declined to submit to cross-examination, that error can be considered harmless under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), where the excluded testimony is merely cumulative to other defense evidence establishing the same facts, and relates to an issue (*e.g.*, consciousness of guilt) that is conceded by the defendant's own evidence?

TABLE OF CONTENTS

	Page
Questions Presented	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdictional Statement	2
Constitutional Provisions Involved	2
Statutory Provision Involved	4
Statement of the Case	5
Reasons for Granting the Writ	9

I. The Respondent's Sixth Amendment Right to Call Witnesses in his Defense was not Violated Simply Because the Prosecution Informed a Defense Witness, in an Advisory, Nonthreatening Manner, of his Right to Counsel and his Right Against Self-Incrimination, and This Witness, After Consulting with Counsel Appointed by the Court, Then Chose to Exercise his Fifth Amendment Rights and Declined to Testify Further. The Holding to the Contrary by the Missouri Court of Appeals Conflicts With, Rather Than Follows, This Court's Decision in *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972), Which Holds Only That a Judge or Prosecutor May Not Effectively Drive a Defense Witness From the Stand by *Threatening* Him With

Prosecution, But Which Does Not Forbid a Court or Prosecutor From Merely Advising a Defense Witness of his Constitutional Rights. 9

II. Even if the Trial Judge Erred in Striking the Direct Testimony of the Defense Witness After He Exercised His Fifth Amendment Right Against Self-Incrimination and Refused to Answer Any Substantive Questions on Cross-Examination, the Error Was Clearly Harmless Under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), Since the Excluded Testimony was Merely Cumulative to Other Defense Evidence Establishing the Same Facts, and Related to an Issue (*i.e.*, Consciousness of Guilt) That Also was Shown by the Respondent's Own Evidence. 17

Conclusion 19

APPENDICES

A. Opinion of the Missouri Court of Appeals, Western District, No. WD 42,317, issued October 30, 1990, which is the decision sought to be reviewed A-1

B. Order of the Missouri Court of Appeals, Western District, issued December 4, 1990, denying the petitioner's alternative motion for rehearing or transfer to the Supreme Court of Missouri A-13

C. Order of the Supreme Court of Missouri, issued January 9, 1991, denying the petitioner's application to transfer to that court A-14

TABLE OF AUTHORITIES

Page

Cases & Treatises

Arizona v. Fulminante, No. 89-839, 48 Cr.L.Rptr. 2107 (U.S. March 26, 1991) 17,19

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) ii,17

State v. Allen, 800 S.W.2d 82 (Mo. App., W.D. 1990) 1,2,5,10,14,17

State v. Brown, 543 S.W.2d 56 (Mo. App., K.C.D. 1976) 15

State v. Richards, 467 S.W.2d 33 (Mo. 1971) 13

State v. Rodden, 728 S.W.2d 212 (Mo. banc 1987) 18

State v. Quigley, 591 S.W.2d 740 (Mo. App., S.D. 1979) 18

State v. Steward, 613 S.W.2d 150 (Mo. App., W.D. 1981) 13

State v. Williams, 525 S.W.2d 395 (Mo. App., St.L.D. 1975) 13

United States v. Blackwell, 694 F.2d 1325 (D.C. Cir. 1982) 15

United States v. Colyer, 571 F.2d 941 (5th Cir. 1978) 15

United States v. Silverstein, 732 F.2d 1338 (7th Cir. 1984) 13

Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972) 9,10,14,19

81 Am.Jur.2d *Witnesses*, § 50, pp. 82-83 (1976) 13,14

98 C.J.S. *Witnesses*, § 449, pp. 286-287 (1957) 13,14

Constitutional Provisions

Amend. V, U.S. Constitution 3,9

Amend. VI, U.S. Constitution 3,9,16

Art. I, § 18(a), Mo. Constitution 3,16

Statutes and Rules

28 U.S.C. § 1257(3) 2

28 U.S.C. § 2101(d) 2

U.S. S.Ct. Rule 13.01 2

U.S. S.Ct. Rule 14.01(b) 5

§ 557.060, RSMo 1986 4,5

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF MISSOURI,
Petitioner,

VS.

RANDY ALLEN
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

OPINIONS BELOW

On October 30, 1990, the Missouri Court of Appeals, Western District, reversed the respondent's conviction for leaving the scene of a motor vehicle accident in the case styled *State of Missouri v. Randy Allen*, No. WD 42,317. That opinion is now reported at *State v. Allen*, 800 S.W.2d 82 (Mo. App., W.D. 1990), and has been reproduced, in its entirety, in Appendix A of this petition.

On December 4, 1990, the Missouri Court of Appeals, Western District, denied the petitioner's alternative motion for rehearing or transfer to the Supreme Court of Missouri in a two-sentence,

unpublished order that has been reproduced, in its entirety, in Appendix B of this petition.

On January 9, 1991, the Supreme Court of Missouri denied the petitioner's application for transfer in a one-sentence, unpublished order that has been reproduced, in its entirety, in Appendix C of this petition.

JURISDICTIONAL STATEMENT

This petition seeks review of the decision of the Missouri Court of Appeals, Western District, issued on October 30, 1990. *State v. Allen*, 800 S.W.2d 82 (Mo. App., W.D. 1990) (Reprinted in Appendix A, *infra*). On December 4, 1990, that court denied the petitioner's alternative motion for rehearing or transfer to the Supreme Court of Missouri (Appendix B, *infra*), and the opinion of the Court of Appeals became final on January 9, 1991, when the Supreme Court of Missouri denied the petitioner's application to transfer (Appendix C, *infra*).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), 28 U.S.C. § 2101(d), and Rule 13.01 of this Court. Pursuant to Rule 13.01 of this Court, the petitioner's petition, which seeks review of a decision of the Missouri Court of Appeals, "a lower state court," has been filed "within 90 days after the entry of the order" of January 9, 1991, by the Supreme Court of Missouri "denying discretionary review."

CONSTITUTIONAL PROVISIONS INVOLVED

As emphasized under the "Questions Presented" section of this petition, the issues presented by this petition implicate both the Fifth and Sixth Amendments to the United States Constitution. Also pertinent to the issues involved is Art. I, § 18 (a) of the Missouri Constitution. These three constitutional provisions read in full as follows:

Amendment V, U.S. Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, U.S. Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Art. I, § 18(a), Missouri Constitution:

> That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county.

STATUTORY PROVISION INVOLVED

The respondent was convicted of, and sentenced for, the felony of leaving the scene of a motor vehicle accident, in violation of § 577.060, RSMo 1986. That statute reads in full as follows:

> 1. A person commits the crime of leaving the scene of a motor vehicle accident when being the operator or driver of a vehicle on the highway or on any publicly or privately owned parking lot or parking facility generally open for use by the public and knowing that an injury has been caused to a person or damage has been caused to property, due to his culpability or to accident, he leaves the place of the injury, damage or accident without stopping and giving his name, residence, including city and street number, motor vehicle number and chauffeur's or registered operator's number, if any, to the injured party or to a police officer, or if no police officer is in the vicinity, then to the nearest police station or judicial officer.
>
> 2. For the purposes of this section, all peace officers shall have jurisdiction, when invited by an injured person, to enter the premises of any privately owned parking lot or parking facility for the purpose of investigating an accident and performing all necessary duties regarding such accident.
>
> 3. Leaving the scene of a motor vehicle accident is a class A misdemeanor, except that it shall be a class D felony if the accident resulted in:
>
> (1) Physical injury to another party; or
>
> (2) Property damage in excess of one thousand dollars; or
>
> (3) If the defendant has previously pled guilty to or been found guilty of a violation of this section.

STATEMENT OF THE CASE

A. Procedural History

The respondent, Randy Allen,[1] was found guilty on June 12, 1989, of leaving the scene of an accident (§ 577.060, RSMo 1986), following a jury trial in the Circuit Court of Jackson County, Missouri, 16th Judicial Circuit (Tr. 294), and, on July 27, 1989, was sentenced by the Honorable Timothy D. O'Leary, Judge of Division No. 15 of the Circuit Court, to a five-year term of imprisonment (Supp. Tr. 12; L.F. 22).

The respondent appealed his conviction to the Missouri Court of Appeals, Western District, which, on October 30, 1990, issued an opinion reversing his conviction and sentence, and remanded the case to the trial court for a new trial. *State v. Allen*, 800 S.W.2d 82 (Mo. App., W.D. 1990).

The Court of Appeals concluded that the respondent was deprived of his Sixth Amendment right to present witnesses in his own defense after the trial judge struck the exculpatory testimony of a defense witness who, after being advised by the prosecution of his Sixth Amendment right to counsel and his Fifth Amendment right against self-incrimination, and after consulting with an attorney appointed by the court to further advise him on these issues, elected to exercise those rights and declined to answer any of the prosecution's questions on cross-examination. *State v. Allen, supra*, 800 S.W.2d 86-87[5-6]. The Court of Appeals concluded that "the prosecutor's warnings effectively drove [the defense witness] off the witness stand, thereby preventing [the respondent] from presenting a witness crucial to his defense." *State v. Allen, supra*, 800 S.W. 2d at 87. "A prosecutor," the court stated, "is not allowed to intimidate a

---

[1] Since the only two parties to this proceeding are listed in the caption of this case, a separate "Parties to the Proceeding" section has not been included in this petition pursuant to Rule 14.01(b) of this Court.

witness into not testifying and then benefit by having the witness's exculpatory testimony stricken." *State v. Allen, id.*

On December 4, 1990, the petitioner's alternative motion for rehearing or transfer to the Missouri Supreme Court was denied by the Court of Appeals (Appendix B, *infra*). On January 9, 1991, the petitioner's application to transfer was denied by the Supreme Court of Missouri. (Appendix C, *infra*). The State of Missouri now seeks this Court's writ of certiorari to review the decision of the Court of Appeals.

B. Evidence

Viewed in a light most favorable to the verdict, the evidence showed the following:

At around 5 o'clock on the evening of July 23, 1988, 5-year-old Rodney Lollis and several other children were riding their bikes near 59th and Lawn in Kansas City, Missouri (Tr. 88, 105-106).[2] When the children got to the corner of the street, 11-year-old Karana McReynolds signaled for the children to stop, but Rodney, who was riding his "Hot Wheels," kept on going (Tr. 105-107, 117). Rodney's "Hot Wheels" collided with the passenger's door of an automobile being driven westbound on 59th street by the respondent, the "Hot Wheels" exploded into pieces, and Rodney was dragged down the street under the vehicle (Tr. 107-108, 117).

A neighbor, Harry Gumby, was coming out of the side door of his house when the accident occurred (Tr. 130-131). He heard a "loud noise," turned and saw Rodney being dragged approximately 25 yards down the street under the respondent's vehicle (Tr. 131-133). The noise, Gumby noted, was "[l]oud enough for

---

[2] The designation "Tr." refers to the transcript of the respondent's trial in state court.

[him] to turn around and look and see what was happening" (Tr. 137). The respondent's car "kind of hesitated" as it passed Gumby's, house, "[l]ike brakes were applied, and then proceeded down the street" without stopping (Tr. 133).

The young boy's head was crushed under the wheels of the respondent's vehicle (Tr. 89, 108, 118, 134). The cause of death officially was attributed to severe "multiple blunt injuries to the head, chest, and abdomen" (Tr. 229).

Approximately a week later, ten-year-old Sonya Striplin was at the home of her grandmother, Carolyn Allen, when she heard some of her family members talking about "a little boy who got hit by a car" (Tr. 190). Dennis Striplin asked the respondent if he had "hit a little boy," and the respondent answered, "Yes" (Tr. 191-192).

At that point, her grandmother asked, "What about the car?" (Tr. 192). Chris Allen answered, "Let's blow it up" (Tr. 192). Although the respondent was not present during this exchange (Tr. 193), Chris Allen left in the respondent's car, and the respondent, Dennis Striplin and Tommy Allen left in another vehicle (Tr. 193-194). They returned in a single vehicle; Sonya said she never saw the respondent's car again (Tr. 194).

On July 29, 1988, the police discovered the respondent's white, two-door 1975 Mercury Marquis burning on 350 Highway, about three-quarters of a mile northwest of Bannister Road in Kansas City (Tr. 242).

By that time, the respondent had gone to the Lake of the Ozarks, where he was staying at a cabin belonging to the parents of Elizabeth Matthews, who testified that she drove the respondent, together with his brothers, Chris and Tommy, to the lake home on July 27th, and immediately returned with Chris and Tommy (Tr. 236-237).

On August 11, 1988, the respondent's parents surrendered their son to the police (Tr. 211). The respondent told the police that at approximately 5 o'clock on the evening of July 23, 1988, he had been driving down 59th Street, and when he approached 59th and Lawn, hit what he thought was a bump in the road, "a chuckhole or something," slowed down a little bit and then continued driving (Tr. 209).

He told the police that he did not know at that time that he had hit anyone (Tr. 209). However, he said that he realized on the following Thursday that he was the person the police were looking for in connection with the hit-and-run accident (Tr. 209). When he realized that he was the subject of the investigation he "[w]ent to the Ozarks: (Tr. 210).

Although the respondent denied any direct involvement in the burning of the car (Tr. 210, 213), he told the police that he knew his brothers "took the car and were going to dispose of it" (Tr. 210).

REASONS FOR GRANTING THE WRIT

I.

THE RESPONDENT'S SIXTH AMENDMENT RIGHT TO CALL WITNESSES IN HIS DEFENSE WAS NOT VIOLATED SIMPLY BECAUSE THE PROSECUTION INFORMED A DEFENSE WITNESS, IN AN ADVISORY, NONTHREATENING MANNER, OF HIS RIGHT TO COUNSEL AND HIS RIGHT AGAINST SELF-INCRIMINATION, AND THIS WITNESS, AFTER CONSULTING WITH COUNSEL APPOINTED BY THE COURT, THEN CHOSE TO EXERCISE HIS FIFTH AMENDMENT RIGHTS AND DECLINED TO TESTIFY FURTHER. THE HOLDING TO THE CONTRARY BY THE MISSOURI COURT OF APPEALS CONFLICTS WITH, RATHER THAN FOLLOWS, THIS COURT'S DECISION IN *WEBB v. TEXAS*, 409 U.S. 95, 93 S.CT. 351, 34 L.Ed.2d 330 (1972), WHICH HOLDS ONLY THAT A JUDGE OR PROSECUTOR MAY NOT EFFECTIVELY DRIVE A DEFENSE WITNESS FROM THE STAND BY *THREATENING* HIM WITH PROSECUTION, BUT WHICH DOES NOT FORBID A COURT OR PROSECUTOR FROM MERELY ADVISING A DEFENSE WITNESS OF HIS CONSTITUTIONAL RIGHTS.

The threshold question presented by this petition is whether the government violates a defendant's Sixth Amendment right to call witnesses in his own behalf if either the court or, as in this case, the prosecutor, warns a defense witness of his right to counsel and of his right against self-incrimination, and then that witness, after consulting with counsel appointed by the court to advise him concerning his rights, chooses to invoke the Fifth Amendment and declines to testify further.

When that happened in the present case, the trial judge, with the agreement of counsel, struck the defense witness' testimony

on direct examination, since the witness' invocation of the Fifth Amendment prevented the State from any effective cross-examination of the witness. However, the Missouri Court of Appeals, Western District, reversed, on the theory "that the prosecutor's warnings effectively drove [the defense witness] off the witness stand, thereby preventing [the respondent] from presenting a witness crucial to his defense." *State v. Allen*, 800 S.W.2d 82, 87 (Mo. App., W.D. 1990).

Although the court purported to rely upon this Court's decision in *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972), that decision stands only for the proposition that either the court or the prosecution violates a defendant's Sixth Amendment right to call witnesses in his own behalf if the witness is threatened or intimidated from testifying by threats of prosecution. This decision does *not* hold that a defendant's Sixth Amendment rights are violated merely because a defense witness refrains from testifying after receiving an advisory, nonthreatening warning concerning his Fifth or Sixth Amendment rights.

In this case, it was undisputed that the respondent was involved in a vehicular accident that claimed the life of a five-year-old and that the respondent then left the scene of that accident. The unchallenged evidence also established that the respondent immediately fled to the Lake of the Ozarks, an area approximately 150 miles southeast of Kansas City, when he learned that he was being sought by the police (Tr. 210, 236-237), and that the vehicle he had been driving at the time of the accident had been burned and left abandoned by members of the respondent's family (Tr. 191-194, 245-247).

Whether the respondent had been actively involved in the burning and abandonment was a subject of dispute. The State's evidence showed that he had participated in the attempted destruction of the evidence, and then left for the Lake of the Ozarks (Tr. 193-194). But the appellant denied in his statement

to police that he was involved in the destruction of his automobile (Tr. 210), and that denial was supported by the testimony of two defense witnesses, Elizabeth Matthews (Tr. 236-237), and Tommy Allen, the respondent's brother (Tr. 244-247).

Tommy Allen, who was an unendorsed witness, testified on direct examination that he had been involved in burning the respondent's vehicle (Tr. 244-245). His two brothers, Chris Allen and Dennis Striplin, had also been involved in the burning, he said, but not the respondent (Tr. 246). The respondent, he said, was at the lake at the time, and did not learn of the burning until the following Saturday, when Tommy Allen called the respondent and told him what they had done (Tr. 246-247).

The assistant prosecutor, Mr. Robert Altice, then cross-examined the respondent as follows:

Q. Mr. Allen, you realize that it's a crime in the State of Missouri to burn physical evidence?

A. No, I don't.

Q. Do you know that now?

A. No.

Q. Do you know that the statement you are making here today could be used against you in any court of law?

A. Yes, I do.

Q. Do you realize you have the right to an attorney?

A. Yes.

Q. You realize anything you say here today can be used against you?

A. Yes, I do.

Q. Would you like an attorney?

A. No.

Q. You would not?

A. I guess. I don't know.

Q. Because I don't want you to get up here and admit a crime. You know you have the right to an attorney; do you realize that?

A. Yes.

Q. Would you like an attorney?

A. Yes.

MR. ALTICE: Your Honor, I don't think I am going to ask him any more questions.

(Tr. 247-248).

When Tommy Allen indicated that he would like an attorney (Tr. 248), the court contacted Mr. Daniel Miller, the Special Public Defender, so that the witness could consult with him prior to resuming his testimony (Tr. 250). Mr. Miller subsequently informed the court that the witness wished to invoke his Fifth Amendment privilege (Tr. 251). The court, outside the presence of the jury, then questioned the witness and learned that he had not previously been informed of his right against self-incrimination (Tr. 251) and that he did not wish to testify further (Tr. 252).

The court excused the witness, and informed the parties that he proposed to strike the witness' testimony and inform the jury that the witness "has decided not to subject himself to cross-examination" (Tr. 253). The court asked, "Is that agreeable with everybody?" and the appellant's attorney answered, "Rather

than say 'subject himself to cross-examination,' I would say 'testify further' " (Tr. 253).

The court then informed the jury that the witness, after consulting with counsel, had advised the court "that he did not want to testify any further about those issues" (Tr. 253). In accordance with the parties' agreement, the court directed the jury that Tommy Allen's testimony was stricken and they were to disregard it (Tr. 253).

Clearly, when the witness refused to answer any substantive questions on cross-examination, striking his testimony on direct examination was the proper remedy, since "the prosecution was deprived by [the witness'] assertion of his Fifth Amendment privilege of an opportunity to cross-examine him." *United States v. Silverstein*, 732 F.2d 1338, 1345[6] (7th Cir. 1984). However, as noted earlier, the Missouri Court of Appeals concluded otherwise, and found that the prosecutor's advisory warnings were improper because they somehow coerced the witness into exercising his Fifth Amendment rights.

Since when? It is, in fact, well settled that it is *not* improper for either the trial judge or the prosecutor to advise a witness of his right against self-incrimination and his right to consult with counsel before deciding to waive his protection against self-incrimination; while the court or the prosecution is not *obligated* to caution the witness in such a fashion, it is considered to be the "preferred practice." 81 Am.Jur.2d *Witnesses*, § 50, pp. 82-83 (1976); 98 C.J.S. *Witnesses*, § 449, pp. 286-287 (1957); *State v. Richards*, 467 S.W.2d 33, 38[14] (Mo. 1971); *State v. Steward*, 613 S.W.2d 150, 152-153[1] (Mo. App., W.D. 1981); *State v. Williams*, 525 S.W.2d 395, 396-397[1] (Mo. App., St.L.D. 1975). The rule has been summarized as follows:

> There is ordinarily no positive rule of law which requires a court to apprise a witness of his right not to give self-

> incriminating evidence, and error cannot be founded on a failure to do so. But fair and impartial judges frequently in proper cases notify witnesses of their rights in this regard when the need appears, and it has been declared that the court should instruct the witness so as to enable him to decide understandingly, and that this is the better practice, especially with reference to ignorant witnesses. The failure to advise a witness of his privilege may affect the question of the use of his testimony against him in a subsequent proceeding.

81 Am.Jur.2d *Witnesses, supra*, § 50 at pp. 82-83.

A similar statement of the rule appears at 98 C.J.S. *Witnesses, supra*, § 449 at 286, where it is stated that, while not absolutely required, "[i]t is proper, however, for the trial court *or counsel* to inform the witness that he is not bound to answer questions where his answers would tend to [in]criminate him" (emphasis supplied).

The Missouri Court of Appeals simply ignored this authority and claimed that its ruling was necessitated by this Court's holding in *Webb v. Texas, supra*, where, the Court of Appeals stated, "[t]he trial judge, on his own initiative, undertook a lengthy and intimidating admonition of the witness about the dangers of perjury." *State v. Allen, supra*, 800 S.W.2d at 87.

But even a cursory reading of the *Webb* opinion shows that the judge did far more than warn the witness about "the dangers of perjury." In fact, the judge in *Webb* threatened the witness that he, the judge, would "personally see that your case goes to the grand jury and you will be indicted for perjury and the lik[e]lihood . . . is that you would get convicted of perjury and that it would be stacked onto what you have already got . . ." *Id.*, 409 U.S. at 96, 93 S.Ct. at 352. The judge in *Webb*, in other words, "did not stop at warning the witness of his right to refuse to testify and of the necessity to tell the truth"—which clearly would not have

been improper—but actually stated that he expected the witness to lie and expressly threatened him with prosecution and a longer sentence if he testified. *Id.*, 409 U.S. at 97, 93 S.Ct. at 353.

Webb, then, does not condemn the practice of a judge or prosecutor warning a witness of the perils of self-incrimination or asking him if he wishes to consult with an attorney, especially where the witness is not represented by counsel; such a procedure is, in fact, to be encouraged. *United States v. Coyler*, 571 F.2d 941, 946[3] (5th Cir. 1978). Similarly, *Webb* does not hold that it is improper *per se* for a trial judge or prosecuting attorney to advise prospective witnesses of the penalties for testifying falsely. *United States v. Blackwell*, 694 F.2d 1325, 1334[9] (D.C. Cir. 1982). All *Webb* actually holds is that "warnings concerning the dangers of perjury cannot be emphasized to the point where they threaten and intimidate the witness into refusing to testify." *Id.*, 694 F.2d at 1334[10].

In the present case, the assistant prosecutor's brief questioning of the witness was designed solely to determine whether the witness had been informed of his rights, and contained no threats, explicit or veiled, of prosecution in the event the witness continued with his testimony. And the witness elected not to testify only *after* consulting with counsel that the court appointed to ensure that any waiver of his Fifth Amendment privilege was, in fact, voluntary.

These crucial facts distinguish this case, not only from *Webb*, but also from *State v. Brown*, 543 S.W.2d 56 (Mo. App., K.C.D. 1976), a case the Court of Appeals insisted was "very similar" to the facts of the instant case, but which, in fact, involved a flagrant example of prosecutorial intimidation—the defense witness in that case elected not to testify only after he was repeatedly and expressly threatened with prosecution. *State v. Brown, supra*, 543 S.W.2d at 58. The Court of Appeals in *Brown* reversed the defendant's conviction in that case, not because of the cautionary

warnings administered by the court—warnings the *Allen* opinion mistakenly attributes to the prosecutor—but rather because the prosecutor drove the witness from the stand by his ham-handed threats of prosecution. *Brown v. State, id.*

The opinion by the Court of Appeals, then, improperly fails to distinguish between merely warning a defense witness of his constitutional rights—which was all that was done in this case—and overt threats of prosecution, which were present in *Webb* and *Brown*. Unquestionably, a violation of the defendant's Sixth Amendment right to call witnesses does not occur simply because a witness, after receiving cautionary warnings from either the court or counsel, elects to exercise his Fifth Amendment rights. Quite simply, a defendant's Sixth Amendment right to call witnesses[3] cannot be used to override the court's or counsel's obligation to inform a witness of *his* constitutional rights.

If the decision of the Missouri Court of Appeals is allowed to stand, a court or prosecutor will run a grave, unacceptable risk in advising any defense witness of his constitutional rights. If the advice is given and then heeded by a defense witness, the inevitable result will be the reversal of the defendant's conviction, since, under the rationale of *Allen*, there exists a conclusive presumption that the witness has been "threatened" or coerced into not testifying.

Such a bizarre result is not consistent with the rationale of *Webb* and certainly was never contemplated by this Court when

---

[3] Although the Missouri Court of Appeals in *Allen* also based its decision on Article I, § 18(a) of the Missouri Constitution, which provides that in criminal prosecutions the accused shall have the right "to have process to compel the attendance of witnesses in his behalf," this provision, which closely mirrors the Sixth Amendment's right "to have compulsory process for obtaining witnesses," has never been construed more broadly than the Sixth Amendment, and does not constitute an "independent basis" for the court's decision.

it issued its decision in *Webb*. This Court should grant the State's petition for certiorari, and hold that the State does not violate a defendant's Sixth Amendment rights to call witnesses merely by advising a defense witness of his constitutional rights in a nonthreatening manner—even if, as in the present case, the witness ultimately elects to exercise the rights of which he has been advised.

II.

EVEN IF THE TRIAL JUDGE ERRED IN STRIKING THE DIRECT TESTIMONY OF THE DEFENSE WITNESS AFTER HE EXERCISED HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION AND REFUSED TO ANSWER ANY SUBSTANTIVE QUESTIONS ON CROSS-EXAMINATION, THE ERROR WAS CLEARLY HARMLESS UNDER *CHAPMAN v. CALIFORNIA*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), SINCE THE EXCLUDED TESTIMONY WAS MERELY CUMULATIVE TO OTHER DEFENSE EVIDENCE ESTABLISHING THE SAME FACTS, AND RELATED TO AN ISSUE (*I.E.*, CONSCIOUSNESS OF GUILT) THAT ALSO WAS SHOWN BY THE RESPONDENT'S OWN EVIDENCE.

Just as there is no support for the conclusion by the Court of Appeals "that the prosecutor's warnings effectively drove Tommy Allen off of the witness stand," equally unsubstantiated is its subsequent statement that this action prevented the respondent "from presenting a witness crucial to his defense." *State v. Allen*, 800 S.W.2d 82, 87 (Mo. App., W.D. 1990). The testimony of Tommy Allen was, in fact, anything but "crucial," and its exclusion, even if error, could only have been harmless error within the meaning of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and this Court's recent decision in *Arizona v. Fulminante*, No. 89-839, 48 Cr.L.Rptr. 2107 (U.S. March 26, 1991).

To begin with, the testimony of the respondent's brother that the court ordered stricken—*i.e.*, that the respondent was not present when his car burned because he was hiding out at the Lake of the Ozarks—was anything but "crucial to his defense," since it was, for one thing, cumulative to other evidence which, if believed by the jury, indicated that the respondent had not been present when his car was burned. Such evidence consisted of the respondent's statement to police, in which he said that he w at the Lake of the Ozarks when the car was burned (Tr. 210, 213), and the testimony of another defense witness, Elizabeth Matthews. She told the jury that she had driven the respondent to the Lake of the Ozarks on July 27, 1988, that he did not return to Kansas City until approximately August 10, 1988 (Tr. 236-238), and that his car was discovered burning on July 29, 1988 (Tr. 242) during the period he was at the lake.

Moreover, the respondent's alleged absence from the city at the time of the burning, even if true, was hardly "crucial evidence." The respondent had admitted to police that he had fled to the Lake of the Ozarks as soon as he realized that the police were looking for him in connection with the incident (Tr. 210). The respondent's flight also was confirmed by the testimony of his own witness, Ms. Matthews (Tr. 236-237). This evidence, of course, tended to demonstrate his consciousness of guilt, *State v. Rodden*, 728 S.W.2d 212, 219[2] (Mo. banc 1987), the same fact sought to be proved by his involvement in the burning of the hit-and-run vehicle. *State v. Quigley*, 591 S.W.2d 740, 743[3] (Mo. App., S.D. 1979) (attempts to destroy evidence to show consciousness of guilt).

Furthermore, the respondent had admitted to police that he knew "his brothers took the car and were going to dispose of it" (Tr. 210). Also, even his brother's testimony indicated that he told the respondent, who was hiding out at the Lake of the Ozarks, that they had burned the respondent's car (Tr. 246-247),

yet the respondent, as far as the record shows, made no protest or any attempt to contact the police at that point.

It was, quite simply, wholly irrelevant whether the *respondent* was present and actively participated in the burning of his vehicle, or whether, as his evidence seemed to indicate, he was aware of his brothers' plans to dispose of the vehicle but was conveniently out of city at the time the burning actually occurred. Either way, the attempted destruction of the vehicle—even if the respondent was not present at the time it was burned—coupled with his flight, demonstrated his consciousness of guilt.

As this Court recently recognized in *Arizona v. Fulminante, supra*, 48 Cr.L.Reptr. at 2114, this Court has applied the harmless analysis of *Chapman* to a variety of Sixth Amendment violations. Assuming that the exclusion of Tommy Allen's testimony was improper, this is a textbook example of constitutional harmless error, since whether or not the respondent was actively involved in burning his vehicle, or merely acquiesced in that decision, was of no legal significance or consequence whatsoever.

CONCLUSION

While this Court established in *Webb v. Texas*, 409 U.S. 95, 98, 93 S.Ct. 351, 353, 34 L.Ed.2d 30 (1972), that a judge violates a defendant's Sixth Amendment right to call witnesses in his own behalf if he *threatens* a defense witness with prosecution, "effectively dr[i]v[ing] that witness off the stand," until now, no court, state or federal, has ever interpreted that decision to absolutely forbid the court, or the prosecutor, from merely advising a defense witness of his right to counsel and of his right against self-incrimination.

In the present case, the simple warning issued to the defense witness by the assistant prosecutor was merely advisory and

nonthreatening, and the witness chose to exercise his Fifth Amendment right against self-incrimination only after he had consulted with an attorney that the court appointed to ensure that any waiver of this right would be knowingly and intelligently made. The fact that the witness, after consulting with counsel, chose to exercise his Fifth Amendment rights, did not somehow transform the prosecutor's innocuous, advisory warning into a "threat" that violated the respondent's Sixth Amendment right to call witnesses.

This Court's writ of certiorari should issue to correct this unjustified, nonsensical extension of *Webb* and its palpable misinterpretation of the Sixth Amendment.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General

PHILIP M. KOPPE
Assistant Attorney General

Penntower Office Center
3100 Broadway, Suite 609
Kansas City, Missouri 64111
(816) 531-4207

Attorneys for Petitioner

APPENDIX

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 42317

STATE OF MISSOURI,
Respondent,

vs.

RANDY ALLEN,
Appellant.

(Opinion Filed: October 30, 1990)

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY

Honorable Timothy D. O'Leary, Judge

Before Kennedy, P.J., Shangler and Gaitan, JJ.

Appellant Randy Allen was convicted upon jury trial on the charge of leaving the scene of a motor vehicle accident in violation of § 577.060, RSMo 1986. The court entered judgment in accordance with the verdict and sentenced appellant to a five-year term of imprisonment. He has appealed to this court and raises the following two allegations of error: (1) that the trial court erred in striking the testimony of defense witness Tommy Allen; and (2) that the evidence was insufficient to support the verdict.

I.

We consider first appellant's allegation that the trial court erred in overruling his motion for judgment of acquittal and his motion for judgment notwithstanding the verdict. In deciding this issue, we consider the evidence and all reasonable inferences

supportive of the verdict in the light most favorable to the verdict, and disregard those portions of the record contrary to a finding of guilt. *State v. Seeger*, 725 S.W.2d 39, 40 (Mo. App. 1986); *State v. Guinan*, 665 S.W.2d 325, 327 (Mo. banc 1984), *cert. denied*, 469 U.S. 873 (1984); *State v. McDonald*, 661 S.W.2d 497, 500 (Mo. banc 1983), *cert. denied*, 471 U.S. 1009 (1985); *State v. Turner*, 623 S.W.2d 4, 6 (Mo. banc 1981), *cert. denied*, 456 U.S. 931 (1982); *State v. Strickland*, 609 S.W.2d 392, 395 (Mo. banc 1980). The test is whether the evidence, so viewed, was sufficient to make a submissible case from which rational jurors could have found beyond a reasonable doubt that appellant was guilty. *Seeger*, 725 S.W.2d at 40; *State v. Bonuchi*, 636 S.W.2d 338, 340 (Mo. banc 1982), *cert. denied*, 459 U.S. 1211 (1983); *State v. Kelly*, 539 S.W.2d 106, 109 (Mo. banc 1976); *State v. Eaton*, 504 S.W.2d 12, 16 (Mo. 1973).

Viewed in that light, the evidence establishes that at around 5 o'clock on the evening of July 23, 1988, 5-year-old Rodney Lollis and several other children were riding their bikes near 59th and Lawn in Kansas City, Missouri. When the children got to the corner of the street, 11-year-old Karana McReynolds signaled for the children to stop, but Rodney, who was riding his Big Wheel, continued on into the intersection. Rodney's Big Wheel collided with the driver's side door of an automobile being driven westbound on 59th Street. Upon impact, the Big Wheel exploded into pieces and flew up into the air. Rodney was dragged down the street under the car for approximately 25 yards.

Harry Gumby was coming out of the side door of his house when his attention was diverted by a "loud noise" in the street in front of his house. Gumby turned and saw a white vehicle coming west on Lawn and dragging a little boy underneath it. Gumby testified that the loud noise was the vehicle's initial point of impact with Rodney. The noise, Gumby said, was "[l]oud enough for me to turn around and look and see what was

happening." Gumby saw Rodney being carried on the front of the car and then fall under the car and come out the back end of the car. After Rodney came out from underneath the car, the car "kind of hesitated" and then took off. Gumby testified that the car's hesitation was as if the brakes were momentarily applied.

Rodney's head was crushed under the wheels of the vehicle. He appeared dead at the scene. He suffered severe head injuries which consisted of a skull fracture and hemorrhages of the brain. The official cause of death was "multiple blunt injuries to the head, chest, and abdomen."

Approximately one week after the accident, 10-year-old Sonya Striplin was at the home of her grandmother, Carolyn Allen, when she heard some of her family members talking about "a little boy who got hit by a car." Dennis Striplin asked appellant whether he had hit the little boy. Sonya testified that appellant answered, "Yes." Sonya's grandmother, Carolyn Allen, then asked, "What about the car?" Appellant's brother, Chris Allen, answered, "Let's blow it up." Appellant was outside when his family members talked about blowing up his car. Later, Chris Allen left alone in appellant's car, and appellant left in a second car with Tommy Allen and Dennis Striplin. Appellant, Tommy Allen and Dennis Striplin eventually came back to the house in the same car they were driving when they left the house. Chris Allen, however, did not come back in appellant's car; he came walking back to the house. Sonya testified that she never saw appellant's car again.

On July 29, 1988, police discovered appellant's white, two-door 1975 Mercury Marquis burning on 350 Highway, about three-quarters of a mile northwest of Bannister Road. Two days earlier, on July 27, appellant went to the Lake of the Ozarks. Appellant was driven to the lake by Elizabeth Mathews, who also drove appellant's brothers, Chris and Tommy Allen. Mathews testified that only appellant remained at the lake, and she, Chris

and Tommy immediately drove back to Kansas City.

Appellant remained at the lake until August 11, 1988, when his parents surrendered him to police. At the police station, appellant stated that he had been at 59th and Lawn at around the time of the accident on July 23, 1988. Appellant told a detective that "he hit what he thought was a bump in the road, a chuckhole or something, slowed down a little bit, and continued on over to . . . his brother's house." Appellant stated that he realized the Thursday following the accident that he had hit the little boy. Investigator Clarence Gibson of the Kansas City, Missouri police department testified that appellant stated that he "[w]ent to the Ozarks" once he realized he was a suspect in the case. Appellant also indicated that his brothers took his car and "were going to dispose of it." Appellant denied that he was involved in his brothers' disposal of the car.

Appellant argues that the evidence was insufficient to establish the required mental state for a conviction under § 577.060.1,[1] that he *knowingly* left the scene of the accident. That statute provides that the offense of leaving the scene of an accident is committed only where a defendant leaves the scene "knowing that an injury has been caused to a person or damage has been

---

[1] Section 577.060.1, RSMo 1986, provides as follows:

A person commits the crime of leaving the scene of a motor vehicle accident when being the operator or driver of a vehicle on the highway or on any publicly or privately owned parking lot or parking facility generally open for use by the public and knowing that an injury has been caused to a person or damage has been caused to property, due to his culpability or to accident, he leaves the place of the injury, damage or accident without stopping and giving his name, residence, including city and street number, motor vehicle number and driver's license number, if any, to the injured party or to a police officer, or if no police officer is in the vicinity, then to the nearest police station or judicial officer.

caused to property." Thus, appellant particularly complains that the State failed to produce substantial evidence that he failed to stop "knowing" that he had been involved in an accident or had caused injury to the little boy.

In support of his argument, appellant cites the case of *State v. Dougherty*, 358 Mo. 734, 216 S.W.2d 467 (1949). In *Doughtery*, the Missouri Supreme Court, in construing the predecessor to 577.060, discussed the element of "knowledge." The court stated:

> We think the word "knowing", as used in the statute, means actual knowledge rather than mere constructive knowledge, or such notice as would put one on inquiry, and more than mere negligence in failing to know, or the mere presence of facts which might have induced the belief in the mind of a reasonable person.

Id. at 472.

That standard was applied in *State v. Teter*, 633 S.W.2d 417 (Mo. App. 1982), and *State v. Seeger*, 725 S.W.2d 39 (Mo. App. 1986), both of which construed the meaning of "knowledge" under § 577.060. In both *Teter* and *Seeger*, it was held that the jury was entitled to infer that the defendants "knew" that they had been involved in accidents. In *Teter*, the defendant was being pursued by police when he struck a motorcycle and inflicted fatal injuries to the motorcyclist. The defendant's vehicle lost a rim and wheel hub, and the glass in the passenger window was cracked. The defendant accelerated from the accident scene, but was eventually apprehended. Appealing his conviction for leaving the scene of an accident, the defendant argued that there was no evidence that he "knew" that an injury had been caused to a person or that damage had been caused to property. The court pointed out that the defendant admitted hearing a loud noise and feeling something flying onto him, and that the windshield was cracked, one side window was smashed and

parts of his vehicle fell off. In light of this evidence, the court rejected the defendant's contention, and held that the jury was entitled to infer that the defendant not only knew that he had collided with some object but, at the very least, that he had damaged property. *Teter*, 633 S.W.2d at 419-20.

Similarly, the court in *Seeger* rejected the defendant's argument that he did not have the requisite "knowledge" to be convicted of leaving the scene of an accident. In that case, the defendant and a passenger were injured when the passenger grabbed the steering wheel, causing the defendant's car to swerve off the highway, strike a sign and collide with a pole. The defendant maintained that he did not know until later that there had been an accident, that anyone had been injured, or that property had been damaged. The court noted that the front end of defendant's car was completely smashed in, the windshield and part of the roof were damaged, and the sign that was struck was completely damaged. The court concluded that the evidence was sufficient to support a finding that the defendant, when he left the accident scene, knew that he had been in an accident and knew that he, or one of his passengers, had been injured. *Seeger*, 725 S.W.2d at 44.

These authorities should be considered in conjunction with the general rule, well settled in Missouri, that "direct proof of the required mental state is seldom available and such intent is usually inferred from circumstantial evidence." *State v. Turner*, 623 S.W.2d at 7. "Knowledge, of course, is also a state of mind and, like intent, is rarely susceptible to direct proof." *Seeger*, 725 S.W.2d at 44. "Mental elements establishing that a defendant knowingly did an act may be proved by indirect evidence and inferences reasonably drawn from circumstances surrounding the incident." *State v. Abercrombie*, 694 S.W.2d 268, 271 (Mo. App. 1985).

Appellant contends that he did not know that he had hit the little boy until the Thursday following the accident. The jurors, however, were entitled to disbelieve that argument. "The credibility and weight of a witness' testimony are for the jury to determine . . . and the jury may believe all, some, or none of the testimony of a witness when considered with the facts, circumstances and other testimony in the case." *Seeger*, 725 S.W.2d at 43 (citations omitted). Guided by the preceding authorities, we hold that the evidence is sufficient to support the jury's finding that appellant, at the time he left the scene of the accident at 59th and Lawn, knew that he had been in an accident and knew that "injury ha[d] been caused to a person or damage ha[d] been caused to property." § 577.060.1, RSMo 1986. The evidence which establishes appellant's knowledge is as follows. Rodney's Big Wheel struck the driver's side door of appellant's automobile. The impact made a loud noise that was heard across the street by Harry Gumby. Upon impact, the Big Wheel disintegrated and pieces of it flew up into the air. Appellant's car dragged Rodney for approximately 25 yards, appellant hesitated, apparently applying his brakes, and then proceeded on. Appellant admitted hiding out in the Ozarks once he realized the police were looking for him. With his knowledge, his car was burned. This is evidence from which rational jurors could have found beyond a reasonable doubt that appellant was guilty. The State is not required to conclusively establish guilt nor exclude every hypothesis of innocence. *State v. Overkamp*, 646 S.W.2d 733, 737 (Mo. 1983); *State v. Prier*, 634 S.W.2d 197, 199 (Mo. banc 1982).

We hold a submissible case was made that appellant left the scene of a motor vehicle accident in violation of § 577.060. This assignment of error is denied.

II.

Appellant's other contention is that the trial court erred in striking the testimony of defense witness Tommy Allen. Appellant contends that this violated his Sixth Amendment right to compulsory process as guaranteed by the United States Constitution and Article I, section 18(a) of the Missouri Constitution. We agree.

At trial, appellant called his brother Tommy Allen as a witness on his behalf. Tommy Allen testified that he and his brothers Chris and Dennis had burned appellant's car. He testified that appellant took no part in the burning and was at the Lake of the Ozarks at the time the car was burned. He also testified that he informed appellant about the burning of the car on the Saturday following the burning. This testimony was exculpatory for appellant in the sense that it tended to negate appellant's guilty knowledge. The prosecutor, on cross-examination, rather than interrogate Tommy Allen about the substance of his direct examination testimony, instead employed a line of "inquiry" relating to whether Tommy Allen knew that it is a crime to destroy evidence and whether he had been given the *Miranda* warnings prior to testifying. After repeated questions along this line, Tommy Allen refused to testify and subsequently invoked his privilege against self-incrimination. The prosecutor moved to have Tommy Allen's direct examination testimony stricken, and the trial court granted the motion.

The pertinent trial record of the cross-examination follows:

PROSECUTOR: Mr. Allen, you realize that it's a crime in the State of Missouri to burn physical evidence?

A: No, I don't

PROSECUTOR: Do you know that now?

A: No.

PROSECUTOR: Do you know that the statement you are making here today could be used against you in any court of law?

A: Yes, I do.

PROSECUTOR: Do you realize you have the right to an attorney?

A: Yes.

PROSECUTOR: You realize anything you say here today can be used against you?

A: Yes, I do.

PROSECUTOR: Would you like an attorney?

A: No.

PROSECUTOR: You would not?

A: I guess. I don't know.

PROSECUTOR: Because I don't want you to get up here and admit a crime. You know you have the right to an attorney; do you realize that?

A: Yes.

PROSECUTOR: Would you like an attorney?

A: Yes.

PROSECUTOR: Your Honor, I don't think I am going to ask him any more questions.

At the bench, the prosecutor moved that the testimony of Tommy Allen be stricken and that the jury be instructed to disregard it. The court then recessed. During that time, a special public defender was summoned to counsel Tommy Allen. After consultation, Tommy Allen decided to invoke his privilege against self-incrimination and refused to testify further. The

court then sustained the prosecutor's motion and struck the entirety of Tommy Allen's testimony.

A criminal defendant's right to present witnesses in his defense is a fundamental element of due process. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 301 (1973). The Supreme Court has described this right as follows:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967).

In *Webb v. Texas*, 409 U.S. 95 (1972), the Supreme Court reversed the appellant's burglary conviction because of the trial judge's "threatening remarks," which "effectively drove the witness off the stand." *Id.* at 98. The trial judge, on his own initiative, undertook a lengthy and intimidating admonition of the witness about the dangers of perjury. This admonition was so severe that the witness refused to testify. "The fact that Mills was willing to come to court to testify in the petitioner's behalf, refusing to do so only after the judge's lengthy and intimidating warning, strongly suggests that the judge's comments were the cause of Mills' refusal to testify." *Id.* at 97. The Court stated that "the unnecessarily strong terms used by the judge could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify." *Id.* at 98. The Court held that this deprived appellant of due process of law under the Fourteenth Amendment.

The *Webb* decision was cited by the court in *State v. Brown*, 543 S.W.2d 56 (Mo. App. 1976). The facts of the *Brown* case are very similar to those involved in this case. In *Brown*, the prosecutor informed a defense witness that if he testified he could later be charged with a crime, asked the witness whether he had sought counsel, asked him if he had any desire to seek counsel, asked him if he was voluntarily testifying, asked him if he was familiar with the *Miranda* rights, etc. This line of inquiry by the prosecutor, the court stated, was "clearly designed to dissuade the witness from testifying." *Id.* at 59. The *Brown* court reversed the appellant's conviction. "The intimidating warning given by the prosecutor in the case before us drove Mr. Burke from the stand and prevented the defendant from presenting a witness crucial to his defense. As in *Webb*, this practice must be condemned as depriving a criminal defendant of due process." *Id.*

We find this authority compelling. We hold that the prosecutor's warnings effectively drove Tommy Allen off the witness stand, thereby preventing appellant from presenting a witness crucial to his defense. The prosecutor's professed concerns about attempting to safeguard the constitutional rights of Tommy Allen are not well taken. The method employed by the prosecutor in this case, ostensibly to protect the rights of the witness, has been properly condemned by the court in *Brown*. A prosecutor is not allowed to intimidate a witness into not testifying and then benefit by having the witness's exculpatory testimony stricken. This deprives a criminal defendant due process. Appellant's right to offer the testimony of witnesses on his behalf is guaranteed by the Sixth Amendment to the Constitution, and made applicable to the states through the Fourteenth Amendment. *See Washington v. Texas*, 388 U.S. at 18-20. This right is also guaranteed in the Missouri Constitution, Article I, section 18(a), which provides: "That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; . . . to have process to compel the attendance of

witnesses in his behalf; . . ." The *Brown* decision stands for the proposition that it is fundamental that a criminal defendant must be permitted to present competent, material evidence in his defense. We hold that appellant's constitutional right to present witnesses in his own defense was impermissibly curtailed in this case. For that reason, the conviction must be reversed and the case remanded for a new trial.

Reversed and remanded.

All concur.

DON W. KENNEDY, Judge

APPENDIX B

Missouri Court of Appeals
Western District
1300 Oak Street
Kansas City, MO. 64106-2970

December 4, 1990

IMPORTANT NOTICE

TO: ALL ATTORNEYS OF RECORD

RE: STATE OF MISSOURI, RESPONDENT
vs.
ALLEN, RANDY, APPELLANT

WD# 42317

Please be advised that Respondent's motion for rehearing is OVERRULED and motion for transfer to Supreme Court is DENIED. See Rule 83.03.

PEGGY STEVENS MCGRAW
CLERK DOCKET ATTORNEY

cc: Philip M. Koppe
David Samuel Durbin

APPENDIX C

IN THE SUPREME COURT OF MISSOURI

No. 73325
W.D. No. 42317

January Session, 1991

State of Missouri,
Respondent,
vs. (TRANSFER)
Randy Allen,
Appellant.

Now at this day, on consideration of respondent's application to transfer the above-entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1991, and on the 9th day of January, 1991, is the above entitled cause.

Given under my hand and seal
of said Court, at the City of
Jefferson, this 9th day of
January, 1991.

/s/ Thomas Simon, Clerk